ONTARIO

SUPERIOR COURT OF JUSTICE

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FAX COVER SHEET

Date: May 15, 2012

TO:	**FAX NO.:**
Jay Strosberg	1 866 316 5308

FROM: Laurie Pietras, Secretary to The Honourable Mr. Justice Strathy

TOTAL PAGES (INCLUDING COVER PAGE): 24

MESSAGE:

RE: Charette v. Trinity Capital Corporation et al
Court file no. CV-11-422085

Please see attached Endorsement released by Mr. Justice Strathy today.

CITATION: *Charette v. Trinity Capital Corporation*, 2012 ONSC 2824
COURT FILE NO.: CV-11-422085
DATE: 20120515

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **Marc Charette**, Plaintiff/Respondent

Trinity Capital Corporation et al., Defendants/Moving Parties

BEFORE: G.R. Strathy J.

COUNSEL: *Joseph Groia & Jay Strosberg*, for the Plaintiff/Respondent

Gerard Chouest & Christopher Dearden, for the Defendants/Respondents BDO Canada and R. Neville

Glenn Smith & Melanie Baird, for the Defendants/Respondents Fraser Milner Casgrain LLP and Graham Turner

Doug Murray, for the Defendant/Respondent Gordon Arnold

DATE HEARD: April 19, 2012

ENDORSEMENT

[1] This is a putative class action arising out of a leveraged charitable donation program.

[2] Several defendants have brought motions for summary judgment dismissing the plaintiff's claim on the ground that it was commenced after the limitation period had expired.

[3] I will begin with the factual background of the plaintiff's claim and the events giving rise to this action. I will then review the submissions of the parties. Finally, I will determine whether the moving parties have met the summary judgment test.

Background

[4] This is one of several class proceedings before the court brought on behalf of taxpayers who participated in so-called "leveraged" charitable donations programs, with the expectation that they would obtain a tax credit in excess of their actual cash outlay: see *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399, [2012] O.J. No. 168 (S.C.J.); *Robinson v. Rochester Financial Ltd.*, 20120 ONSC 463, [2010] O.J. No. 187 (S.C.J.); *Lipson v. Cassels Brock &*

Blackwell LLP, 2011 ONSC 6724, [2011] O.J. No. 5062 (S.C.J.). To the disappointment of these taxpayers and contrary to the opinions of the promoter and its legal and accounting advisors, Canada Revenue Agency (CRA) disallowed their claims, requiring them to pay additional taxes, interest and, in some cases, penalties. They have typically brought lawsuits against the promoters of the program, the lawyers who issued opinions on the efficacy of the program, and the individuals and corporations connected to the program.

The Donation Program

[5] In this case, participating taxpayers made donations to the John McKellar Charitable Foundation (the Foundation), through a program called the Donation Program for Medical Science and Technology (the Program). In order to participate in the Program, a person was required to make a donation of at least $100,000. Some donated multiples of this amount. Donors were required to use their own funds for a portion of the donation and were given the option of financing the remainder of the donation – the leveraged portion. The Foundation issued a charitable donation tax receipt to each donor to enable them to claim an income tax credit. It was allegedly represented that the donation would result in a tax credit of up to 62.4% of the total of the cash and leveraged loan amount, depending on the donor's province of residence. Effectively, therefore, taxpayers would make a profit from their charitable donations. The Program operated in the 2001, 2002 and 2003 taxation years.

[6] The program was promoted by the defendant Trinity Capital Corporation (Trinity) and related companies. The defendant James Gordon Arnold (Arnold) was an officer of the defendant TC Capital Limited, one of the corporations that allegedly designed and implemented the Program in collaboration with the other defendants.

[7] The plaintiff alleges that it was a central feature of the promotion of the Program that Fraser Milner Casgrain LLP (FMC) and BDO Dunwoody LLP (BDO) had provided tax opinions in support of the ability of the Program to deliver valid charitable receipts. FMC was described in the promotional material as "one of Canada's pre-eminent international law firms", and BDO was described as "one of Canada's leading business advisory firms".

[8] The opinion provided by FMC, which was allegedly authored by the defendant Turner, an FMC partner, stated that the transactions contemplated by the Program should constitute a gift to a charity that would entitle the donor to a tax credit. It also stated that the opinion could be relied upon by a donor who was a prospective participant in the Program.

[9] The BDO opinion was allegedly authored by the defendant Neville, a partner in the firm. It stated that the participant's donation should be treated as a charitable donation for income tax purposes, entitling the donor to a tax credit.

The Representative Plaintiff

[10] The proposed representative plaintiff, Marc Charette (Charette) alleges that these tax opinions were used to market the Program, with the consent of FMC and BDO. He alleges that FMC and BDO were negligent and that they knew or should have known that the tax credits would be disallowed by CRA, as in fact occurred.

[11] Charette participated in the Program in 2002 and 2003. He had previously participated in several other tax shelters. On at least three occasions, his tax filings had been reviewed by CRA and, in one of those cases, he was unsuccessful in challenging CRA's ruling and CRA's reassessment was maintained. He was, one might conclude, a relatively sophisticated taxpayer with some familiarity with the CRA assessment process.

[12] Charette made donations of $1 million to the Foundation in 2002 and $100,000 in 2003. These were made partly with his own funds and were partly leveraged through loans from one of the companies behind the Program. He received charitable receipts from the Foundation for the full amounts of his donations and claimed a tax credit for those amounts on his tax returns in the years in question.

[13] Charette claims that he read the BDO and FMC opinion letters before participating in the Program and that, but for the opinions expressed in those letters, he would not have participated in the Program.

CRA's Position – Reassessment of Charette's Return

[14] Unfortunately, CRA did not share everyone's enthusiasm for the Program. Charette received letters from CRA, beginning in November 2005 and continuing in January through April 2006, advising him that it was reviewing his donations to the Foundation and was seeking further information.

[15] CRA's letter, dated November 30, 2005, informed Charette that his 2002 income tax return was being reviewed with respect to his donations to the Foundation. It included a detailed list of information and documents that he was asked to submit to CRA within thirty days. In a subsequent letter, dated January 17, 2006, which Charette has been unable to locate, CRA advised him of its reasons for proposing to disallow the donations he made to the Foundation. Later, as we shall see, CRA reassessed his tax returns for both years, disallowing the charitable tax credits and requiring him to pay the adjusted tax owing.

Ongoing Involvement of FMC in Representing Charette against CRA

[16] In response to this and similar letters from CRA to other participants in the Program, the promoters, Trinity, retained FMC to act on behalf of donors in responding to CRA and challenging its position. On or about February 15, 2006, Charette received a letter from FMC, offering its services to assist him in preparing a response to CRA's correspondence. It enclosed a retainer letter, which Charette signed. The letter stated that FMC would advise Charette in

connection with his reassessment or proposed reassessment for the taxation years in which he participated in the Program and would act on his behalf in all appeal proceedings.

[17] As will become apparent, this may have been a fateful step. FMC took on a solicitor-client relationship with Charette and other donors. There is no evidence before me that FMC advised Charette, then or at any later date, that it might have a conflict of interest in representing him. FMC's own interests and the interests of its client, Trinity, might conflict with Charette's interests, because Charette might have claims against both FMC and Trinity if their representations concerning the effectiveness of the Program were not fulfilled. I will return to this issue later in these reasons.

[18] On or about February 21, 2006, Charette received a letter from the law firm Kavanagh, Bateman and Baek, LLP (KKB), which was acting as agent for FMC, stating that it would request on his behalf an extension of time to respond to CRA's correspondence and enclosing certain documents, including a draft response to the CRA letter. Charette amended the letter and returned it to KBB so that they could file his response.

[19] On or about February 24, 2006, Charette received a letter from CRA telling him to ignore its January 17, 2006 letter until CRA had an opportunity to review the information that he had undertaken to submit in response to the November 30, 2005 letter.

[20] On March 16, 2006, KKB wrote to CRA on Charette's behalf, attaching a copy of FMC's opinion and stating that, for the reasons set out in FMC's opinion, Charette was entitled to the tax credits he had claimed. A copy of this letter was sent to Charette.

[21] On March 31, 2006, Trinity wrote to Charette outlining "the steps that [Trinity] has arranged to deal with the activities by [CRA] in this matter." It was stated that the letter was being transmitted only to donors who had retained FMC and KKB "as it represents strategy for existing and contemplated litigation".

[22] The letter from Trinity to Charette and to other participants in the Program that had retained FMC set out the strategy that Trinity and FMC proposed to follow to challenge CRA's position. It said that CRA's position was weak, had a "poor chance of success", and that its legal analysis was "flawed". It accused CRA of trying to "intimidate" donors and suggested that CRA might be found guilty of "misfeasance". The letter said that taxpayers had no legal obligation to pay the taxes if they had filed a Notice of Objection, but observed that some might wish to do so to avoid the accrual of interest.

[23] On April 11, 2006, CRA advised Charette, through BKK, that it would be issuing a Notice of Reassessment "in due course".

[24] On about June 19, 2006, Charette received a Notice of Reassessment from CRA with respect to his 2002 return. It informed him that CRA had disallowed the tax credit he had claimed because, in its view, the donation was not a valid gift. The notice asserted that the 25 year interest-free loan that he had received for the "leveraged" portion of the donation was not *bona fide* and the series of transactions offended the General Anti-Tax Avoidance Rule (GAAR).

[25] On June 26, 2006, in response to this Notice of Reassessment, Charette paid the additional taxes and interest set out in the Notice of Reassessment in the amount of $579,319.97. He did so, because he was aware that interest on his taxes was continuing to run and that if he failed to persuade CRA to change its position, the interest penalty would be substantial. He did not seek legal advice in connection with this payment and simply decided to make it on his own.

[26] Charette filed an objection to the Notice of Reassessment, through BKK, on June 30, 2006. He received a letter dated July 17, 2006, from CRA, indicating that his objection had been received and would be reviewed. The letter stated that because the same issue was "shared" by other taxpayers, decisions on his file would be deferred "pending resolution of related objections." The letter noted that he could avoid interest on the unpaid balance by making a payment on his account and that if his objection was allowed, he would receive interest on any refund.

[27] About a year later, on June 1, 2007, Charette received another letter from CRA, stating that the tax credits he had claimed for the 2003 tax year were going to be disallowed for the same reasons as those given for 2002. He received a Notice of Reassessment of his 2003 tax return on August 2, 2007. In response, he paid $60,528.05, the amount CRA claimed was owing, on August 22, 2007.

[28] FMC and Trinity arranged for Notices of Objection to CRA's reassessment of Charette's 2003 return to be filed on his behalf. They did the same for others who had retained FMC. Charette was informed that there was no deadline for CRA to deal with his objections pending the determination of the test case and that FMC was not intending to press CRA to do so.

[29] In July 2006, Charette was advised by CRA that his Notice of Objection for the 2002 year had been received and that "decisions on your file will be deferred pending resolution of related objections", namely the test case relating to 2001 and objections by other participants in the 2001 and 2002 years. In September 2008, CRA again advised Charette that decisions on his objections for 2002 and 2003 "will be deferred pending resolution of related objections".

[30] On or about September 29, 2008, Charette was advised that due to a "financial dispute" with Trinity, FMC had withdrawn from representing donors in the test case. The case was taken over by the Miller Thomson law firm. In November 2008, Charette contributed funding for the test case.

[31] On November 12, 2009, the Tax Court of Canada released its decision in the test case, *Canada v. Maréchaux*. 2009 TCC 587, [2009] 2 C.T.C. 2099. It held that the donor was not entitled to the income tax credits that he had claimed for his donations to the Program in the 2001 tax year. Trinity advised Charette of this decision on about February 1, 2010 and told him that an appeal had been filed on December 11, 2009.

[32] On October 28, 2010, the Federal Court of Appeal dismissed *Maréchaux*'s appeal and affirmed the judgment of the Tax Court of Canada: *Maréchaux v. Canada.*, 2010 FCA 287, [2011] 2 C.T.C. 77. An application for leave to appeal was dismissed on June 9, 2011: [2011] S.C.C.A. No. 45.

[33] The statement of claim in this action was issued on March 11, 2011. This was less than two years after the Tax Court's decision in *Maréchaux*, but almost five years after Charette received the Notice of Reassessment of his 2002 return and paid the taxes owing.

The CRA Assessment Process

[34] Both sides have adduced evidence concerning the CRA assessment and appeal process.

[35] FMC and BDO rely on an affidavit of Douglas Ball (Ball), the head of BDO's National Tax Department, which provides information concerning the assessment and reassessment processes followed by CRA. Ball deposes that before CRA reassesses a return, it will usually advise a taxpayer by letter of the proposed reassessment, set out its position on the issues, and give the taxpayer an opportunity to make further representations within 30 days. This is known as a "30 day letter", referring to the time period within which the taxpayer is invited to make representations in response to CRA's position.

[36] Ball expresses the opinion that Charette would have received a 30 day letter before he received his Notice of Reassessment. This appears to have been the letter of January 17, 2006, referred to earlier, in which CRA set out its reasons for disallowing the tax credit claimed by Charette. The point of this evidence appears to be that, by the time he received the Notice of Reassessment, Charette was aware that CRA was proposing to disallow the tax credit on the ground that it was not a valid gift under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). The defendants say that Charette therefore knew that CRA was taking a position contrary to what he was led to expect by FMC, BDO and the promoters.

[37] In response to the defendants' motions, the plaintiff has filed an affidavit of Vern Krishna (Krishna), a respected tax lawyer, who has given expert evidence in a number of these charitable donation cases. The defendants challenge Krishna's evidence on the basis that he expresses opinions of law that are not properly the subject of expert evidence.

[38] Krishna's affidavit describes the practice of the Minister of National Revenue in the assessment of a taxpayer's return. He says that on receipt of the tax return, the Minister will either accept or reject the taxpayer's self-assessment of the tax owing. Before issuing a Notice of Assessment, CRA may ask for further information from the taxpayer and will generally issue a proposal letter to the taxpayer indicating the proposed assessment and giving the taxpayer 30 days to respond to the proposed assessment. This is the 30 day letter to which Ball refers.

[39] Although Krishna does not specifically refer to it, at this stage, if the issues are not resolved, CRA will issue a Notice of Assessment or Reassessment. A taxpayer who disagrees with the assessment can file a Notice of Objection with CRA. This triggers the appeal process, which Krishna describes as having two components, one administrative and the other judicial. Generally, the taxpayer has 90 days from the date of the mailing of the Notice of Assessment to file an objection.

[40] Krishna states that the filing of the objection starts an administrative appeal process within CRA, which may include the delivery of additional information by the taxpayer and

further discussions and negotiations. Krishna states, in a passage that is contentious, that "[T]he alleged liability for additional taxes in not crystallized at this stage. Any potentially liability is contingent on the Minister establishing the underlying facts and legal assumptions of his assessment. The taxpayer is not obliged to pay any alleged taxes pending resolution of the tax dispute."

[41] Krishna states that if the taxpayer is successful in having the assessment set aside, CRA must refund any excess takes paid, with interest.

[42] At the end of this administrative process, which Krishna states could last several years, the Minister will issue a Notice of Confirmation which will confirm or vary the original Notice of Assessment or Reassessment. He states that "[T]he Notice of Confirmation is the Minister's final administrative act whereby he officially notifies the taxpayer of his administrative assessment and his intention to proceed to collection."

[43] If the taxpayer does not wish to accept the Minister's assessment, he or she has 90 days from the Notice of Confirmation to file a Notice of Appeal to the Tax Court. The Minister is not permitted to collect any outstanding taxes pending the resolution of the taxpayer's appeals. The Tax Court can dismiss the appeal, vacate the assessment, vary the assessment or refer the matter back to the Minister for reconsideration and reassessment.

[44] Krishna's opinion is relied upon by the plaintiff in support of his submission that a taxpayer has no obligation to pay the taxes assessed by the Minister until such time as the issue has been resolved after an appeal to the Tax Court.

[45] I agree with the defendants that the date on which liability for tax crystallizes is a question of law and is not the proper subject of an expert opinion. There is no question, however, that while the objection and appeal process is underway, the taxpayer has no obligation to pay the amount in dispute.

Submissions of the Moving Parties, the Defendants

[46] The moving parties say that this action should be dismissed against them as time-barred. They say that Charette discovered the elements of his claim against them on June 19, 2006, when he received a Notice of Reassessment from CRA with respect to his 2002 return, informing him that he would not receive the tax credits he says he was promised.

[47] The defendants allege that Charette was a sophisticated investor, with experience in tax shelters and with the CRA reassessment process. He knew, or ought to have known, once he received the CRA Notice of Assessment and certainly once he paid the approximately $600,000 in taxes and interest that:

> (a) he had suffered loss because he had been required by CRA to pay additional taxes, interest and penalties;

> (b) this loss was caused by his reliance on representations that the full amount of the donations would be allowed by CRA as charitable donations;
>
> (c) the moving parties had made respresentations that he had relied upon; and
>
> (d) commencing a legal proceeding against the moving parties would be an appropriate means to seek a remedy.

[48] The defendants therefore say that Charette's claim against them became time-barred two years later, on June 19, 2008.

[49] I will set out and discuss below the applicable provisions of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. BDO relies on the leading case of *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, [1986] S.C.J. No. 52 at para. 77, in support of the proposition that:

> . . . a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence . . .

[50] In *Lawless v. Anderson*, 2011 ONCA 102, [2011] O.J. No. 519, the Court of Appeal, at para. 23, described this question as a "fact-based analysis", the question being whether the prospective plaintiff "knows enough facts on which to base an allegation of negligence against the defendant."

[51] The defendants rely on the recent decision of Perell J. in *Lipson v. Cassels Brock & Blackwell LLP*, above, a case which they describe as "factually on all fours" with this action. I will discuss that case below.

[52] The defendants note that Charette alleges that he would not have participated in the Program had it not been for the representations of the promoters and the opinions of BDO and FMC that donors would likely be entitled to tax credits. It follows, they say, that Charette knew that if these opinions were wrong, he would suffer a loss.

[53] The defendants say, therefore, that at the latest by June 19, 2006, when he received the Notice of Reassessment stating that the tax credits he had claimed had been disallowed, Charette knew that if the representations made to him were wrong, he would suffer a loss. He also knew that CRA had taken the position that the BDO and FMC opinions were wrong. He therefore knew that it would be prudent to seek legal advice concerning the implications of CRA's position and that commencing a legal proceeding would be an appropriate way to seek a remedy against the defendants.

[54] The defendants say that what is important is that Charette understood the relevant facts. It is immaterial, they say, that he did not appreciate their significance or their legal

consequences: *Nicholas v. McCarthy Tétrault*, [2008] O.J. No. 4258 (S.C.J.) at paras. 28 and 29; affd 2009 ONCA 692; leave to appeal to SCC refused, [2009] S.C.C.A. No. 476.

[55] They also say that a judicial determination of Charette's rights was not required to establish "injury, loss or damage" within the meaning of the *Limitations Act, 2002*: *Huston Estate v. Alberta (North Alberta Land Registration District)*, [1988] A.J. No. 106 (Q.B.); aff'd [1989] A.J. No. 259 (Alta. C.A.); leave to appeal ref'd. [1989] 6 W.W.R. lxviii. He was not entitled to wait until after *Maréchaux* was decided or until his own objections had been resolved before the limitation period began to run.

Submissions of the Responding Party, the Plaintiff

[56] Charette's response to these motions focuses primarily on FMC and on the fact that he entered into a solicitor and client relationship with FMC for the purpose of responding to CRA's position that he was not entitled to a tax credit. He says that throughout the time FMC was representing him, he was being advised that (a) FMC's position was correct and CRA was wrong; and (b) there was no deadline for CRA to deal with his objections and "pending the adjudication of the test case ... Trinity and FMC do not intend to press CRA to do so."

[57] Charette says that he simply followed the advice of his lawyers and waited until the "test case" launched by FMC had been resolved by the Tax Court of Canada. He commenced this action within two years of the decision in *Maréchaux*.

[58] Charette says that, in view of his solicitor and client relationship with FMC, the law firm breached its duty to him, and breached its obligations under rule 6.09 of the *Rules of Professional Conduct*, to advise him of his potential claim against FMC and to insist that he seek independent legal advice. It is not disputed that FMC never advised Charette that he had a potential claim against FMC or the other defendants, that there was a time limit to commence such claims, or that he should obtain independent legal advice with respect to these matters.

[59] As well, Charette says that his relationship with FMC was one of dependency, which made it impossible for him to assess whether he had a claim against FMC and whether a proceeding was an appropriate means to seek a remedy: see *Sheeraz v. Kayani* (2009), 99 O.R. (3d) 450, [2009] O.J. No. 3751 (S.C.J.), discussed below, at para. 48.

[60] Charette says that as a result of the conduct of FMC, it and the other defendants are not entitled to rely on the limitation period.

[61] Charette says that even until this date, he has not received a Notice of Confirmation with respect to the tax returns at issue.

[62] Charette therefore says that he has not sustained damage to start the limitation period running, because his damage is contingent on the possibility that CRA will confirm its reassessment.

[63] Alternatively, Charette says that the limitation period has not yet begun to run, because the full extent of his damages have not yet been determined as he and other class members are still challenging their reassessments. The full extent of damages is unknown and must await the completion of the assessment process by CRA. The liability for taxes is not triggered until 90 days after the taxpayer has been notified by the Minister that the assessment has been confirmed or varied: *Income Tax Act*, s. 225.1(2). Even after that time, the taxpayer is not obliged to pay the taxes if an appeal to the Tax Court of Canada is lodged within 90 days. If the appeal is successful, any excess taxes paid, as well as interest, must be refunded.

Analysis

The Test for Summary Judgment

[64] In January 2010, the test for summary judgment was changed from "no genuine issue for trial" to "no genuine issue requiring a trial." Rule 20.04(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 now provides:

> 20.04 (2) The court shall grant summary judgment if,
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence;
> ...
> (2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
> 1. Weighing the evidence.
> 2. Evaluating the credibility of a deponent.
> 3. Drawing any reasonable inference from the evidence

[65] In *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, released on December 5, 2011, the Court of Appeal established a new test, which it labelled the "full appreciation test": "can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?" [at para. 50].

[66] The new test focuses on procedural and substantive fairness in reaching a just disposition of the parties' dispute. At para. 38, the court emphasized that "the purpose of the new rule is to eliminate *unnecessary* trials, not to eliminate all trials" and that the motion judge must follow the "guiding consideration" of whether, in the circumstances of the case, the summary judgment process will bring about a "fair and just resolution of the dispute before the court."

[67] The court added, at para. 39, that the answer to this question will depend on the nature of the issues confronting the court and the nature of the evidence before the court, an analysis that requires a case-by-case determination:

> Although both the summary judgment motion and a full trial are processes by which actions may be adjudicated in the "interest of justice", the procedural fairness of each of these two processes depends on the nature of the issues posed and the evidence led by the parties. In some cases, it is safe to determine the matter on a motion for summary judgment because the motion record is sufficient to ensure that a just result can be achieved without the need for a full trial. In other cases, the record will not be adequate for this purpose, nor can it be made so regardless of the specific tools that are now available to the motion judge. In such cases, a just result can only be achieved through the trial process. This pivotal determination must be made on a case-by-case basis.

[68] The Court of Appeal described, at paras. 51 and 52, the circumstances in which, applying the full appreciation test, summary judgment might be appropriate. It cautioned against the use of summary judgment in cases where it is necessary to make numerous findings of fact based on an extensive testimonial record. In contrast, it said, document-based cases, or cases in which there are few contentious factual issues, may be more amenable to summary judgment:

> We think this "full appreciation test" provides a useful benchmark for deciding whether or not a trial is required in the interest of justice. In cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process. Generally speaking, in those cases, the motion judge simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Accordingly, the full appreciation test is not met and the "interest of justice" requires a trial.
>
> In contrast, in document-driven cases with limited testimonial evidence, a motion judge would be able to achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Similarly, the full appreciation test may be met in cases with limited contentious factual issues. The full appreciation test may also be met in cases where the record can be supplemented to the requisite degree at the motion judge's direction by hearing oral evidence on discrete issues.

[69] Prior to *Combined Air*, the Court of Appeal had expressed the view that generally speaking, where the application of the discoverability rule was central to its resolution, a case

should not be decided on summary judgment: *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161, [1998] O.J. No. 459 at para. 36 and in *Smyth v. Waterfall* (2000), 50 O.R. (3d) 481, [2000] O.J. No. 3494 (C.A.) at para. 10. In *Augonie*, the Court of Appeal stated, at para. 36:

> *Ontario New Home Warranty Program v. 567292 Ontario Ltd.* (1990), 71 O.R. (2d) 535 (Ont. H.C.) is a case that illustrates that, generally speaking, it is not appropriate for a motions judge, hearing a motion for summary judgment where the application of the discoverability rule is central to its resolution, to resolve this issue. At pp. 545 - 46 Philp J., after noting that the determination of when the cause of action arose for the purpose of the starting point of a limitation period depends on mixed fact and law, concluded: "I cannot answer the question of when the plaintiff knew or ought to have known that there were defects, or sufficient defects, for the limitation period to start running." Following the reasoning of Campbell J. in *Riveria Farms Ltd. v. Paegus Financial Corp. Ltd.* (1988), 29 C.P.C. (2d) 217 at 221 (High H.C.), he concluded that this was the job of the trial judge. The commencement of the limitation period, as in this appeal, constituted a genuine issue for trial.

[70] These observations were made before the amendment of Rule 20, which enlarged the role of the motions judge, permitting him or her to weigh evidence, make credibility findings and draw inferences. The earlier cases must therefore be read with caution in light of the amendment to the rule: see *Tim's Meat, Deli & Grocery Inc. v. Dubinsky*, [2010] O.J. No. 2859, 2010 ONSC 3829 (S.C.J.) at para. 22.

The Limitation Period

[71] There is no real dispute between the parties concerning the applicable limitation period. The *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, replaced the former *Limitations Act*, R.S.O. 1990, c. L. 15 on January 1, 2004. The "effective date" of the new *Act* was January 1, 2004. The principal effects of the new statute were to change the limitation period applicable to most actions from six to two years and to codify a test for the "discoverability" requirement for the commencement of the limitation period.

[72] Section 4 of the *Limitations Act, 2002* states that, except as otherwise provided, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. Section 5 sets out the rule with respect to discovery and contains a presumption concerning discovery:

> 5. (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,

> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[73] It is noteworthy that the test for discoverability is on a sliding scale, beginning with the presumptive date on which the act or omission took place (ss. 5(2)), unless the plaintiff proves otherwise, in which case the time runs from the earlier of the date on which the plaintiff had knowledge of the relevant circumstances and the date on which a reasonable person ought to have known of the matters referred to in clause 5(1)(a).

[74] Section 24 of the *Limitations Act, 2002* provides that its transitional rules apply to "claims based on acts or omissions that took place before the effective date and in respect of which no proceeding has been commenced before the effective date" (s. 24(2)).

[75] The "acts or omissions" Mr. Charette alleges against the moving parties took place before January 1, 2004, and he did not bring his claim until after January 1, 2004. Accordingly, the transitional rules apply to his claim.

[76] Section 24(5) of the *Limitations Act, 2002* states as follows:

> If the former limitation period did not expire before the effective date and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, the following rules apply:

> 1. If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date.
>
> 2. If the claim was discovered before the effective date, the former limitation period applies.

[77] There is no suggestion here that Mr. Charette's claim was discovered before January 1, 2004. Had it been, the former six year limitation period would have applied and the action would have been time barred before January 1, 2010.

[78] Since the claim was discovered after the effective date of the *Limitations Act, 2002*, the two year limitation period applies and the action is time-barred two years after the date of discovery. The question is, therefore: when was the claim discovered? When did Charette know or ought he to have known of the pertinent facts?

Application of the Limitation Period: Lipson v. Cassels Brock & Blackwell

[79] The defendants rely on the decision of Perell J. in *Lipson v Cassels Brock & Blackwell LLP*, above, a case that bears considerable similarity to this.

[80] In that case, also a proposed class action, the plaintiff had participated in a charitable tax credit program, which was marketed with an opinion from the defendant law firm stating that it was unlikely that CRA could successfully deny the tax credits. The plaintiff testified that he would not have participated in the program but for the law firm's opinion.

[81] CRA had disallowed the tax credits claimed, in their entirety, in 2004. In 2006, the plaintiff and other participants retained a different law firm to pursue test cases. The litigation settled in 2008, with the plaintiffs receiving a tax credit for the cash portion of their donation, but the greater, "leveraged" part of the anticipated credit was denied. In 2009, the plaintiff commenced an action against the law firm that had given the original opinion for damages for negligence and negligent misrepresentation.

[82] Perell J. found that when the plaintiff received a letter from CRA in 2004, disallowing his claim for tax credits, the plaintiff,

> ... immediately realized that there was problem, and he sought legal and accounting advice at some expense. During his cross-examination, he stated that he realized that the tax treatment allegedly ensured by Cassels Brock's opinion "was not going to happen" [at para. 38].

[83] The plaintiff argued, however, that the settlement with CRA crystallized his damages and that with that settlement he discovered that he had suffered damages and that he had a claim against the law firm.

[84] Perell J. found that the plaintiff's claim against the law firm was time-barred.

[85] He began by observing that the failure of a plaintiff to appreciate the legal significance of the material facts does not postpone the commencement of the limitation period if he or she knows the existence of the factual elements that make up the cause of action – at para. 137:

> The circumstance that a potential claimant may not appreciate the legal significance of the facts does not postpone the commencement of the limitation period if he or she knows or ought to know the existence of the material facts, which is to say, the constitute factual elements of his or her cause of action. Error or ignorance of the law or legal consequences of the facts does not postpone the running of the limitation period: *Nicholas v. McCarthy Tétrault*, [2008] O.J. No. 4258 (S.C.J.), aff'd [2009] O.J. No. 686 (C.A.), leave to appeal to S.C.C. ref'd [2009] S.C.C.A. 476.

[86] He concluded that the decision of the Supreme Court of Canada in *Central Trust Co. v. Rafuse*, above, was dispositive of the issue before him. In that case, it was held that the limitation period began to run at the time the validity of the mortgage held by the plaintiff was challenged, not when it was ultimately declared to be invalid in foreclosure proceedings.

[87] Perell J. held that the same analysis could be applied to the case before him. He held that as soon as class members started to receive correspondence from CRA denying the validity of the tax credits they had claimed, they knew or ought to have known that damage had been caused by their reliance on the opinion of the law firm – at paras. 148-151:

> The same analysis can be applied to the case at bar. The Class Members, including Mr. Lipson, discovered or should have discovered their tort claims against Cassels Brock when the validity of the tax credits was denied by Canada Revenue in 2004. At that time and certainly not later than 2006, when Thornsteinssons [sic] LLP was retained to sue Canada Revenue, the Class Members knew or ought to have known the material facts on which the negligence claim or negligent misrepresentation claim against Cassels Brock was based.
>
> Like Central Trust, which took the security of a mortgage that turned out to be illegal based on its lawyers' title opinion, in the case at bar, the Class Members made donations that turned out to be ineligible for tax credits. It is alleged that the Class Members relied on Cassels Brock's opinions or but for Cassels Brock's opinions they would not have participated in the Timeshare Program. In both situations, albeit with hindsight, the damage to the participants occurred at the time when Cassels Brock was negligent but their awareness of the material facts of their claim

> against Cassels Brock came later when Central Trust or the participants in the Timeshare Program respectively learned that there was a potential problem with the tax credits.
>
> In the case at bar, as soon as the letters from Canada Revenue started to arrive, Mr. Lipson and the Class Members knew or ought to have known that Cassels Brock's opinion had caused them damage because they had actually relied on the opinions, or, but for those opinions they would not or could not have participated in the Timeshare Program and suffered damages. Given that Canada Revenue was challenging the validity of the trust, the validity of the gift, the donative intent of the participants, and the value of the donation, the donors knew that Canada Revenue could successfully deny the tax credit.
>
> The Class Members had all of the material facts necessary to determine that they had grounds for understanding that they had a tort claim against Cassels Brock. The Class Members may not have known the full extent of what it was going to cost them for having participated in the Timeshare Program but they did know that there had been harm caused because of Cassels Brock's opinions.

[88] I respectfully agree with the analysis and conclusions of Perell J. on the facts before him. In that case, the plaintiff and other donors retained another law firm, Thorsteinssons, to represent them in their dispute with CRA. There was no possible conflict of interest that might cloud their understanding of their rights against Cassels Brock. In this case, however, the evidence before me suggests that the very party Charette and the other donors might have sued had offered to act as their lawyer and was – and had been – representing the other party they might have sued. I turn now to the potential consequences of this conduct on the running of the limitation period.

Extension or Interruption of the Limitation Period Due to Defendant's Conduct

[89] A limitation period may be extended, or possibly interrupted, by fraudulent concealment: *Giroux Estate v. Trillium Health Centre* (2005), 74 O.R. (3d) 341, [2005] O.J. No. 226 (C.A.).

[90] This is not a case of "fraudulent concealment", such as *Giroux Estate*, but the principle expressed in that case may apply here.

[91] In *Giroux Estate*, it was alleged that a doctor was negligent in failing to diagnose and properly treat a cancerous tumour that ultimately took the life of the deceased. The deceased's estate commenced an action three and a half years after the death. The defendant alleged that the action was barred by the two year limitation period contained in the *Trustee Act*, R.S.O. 1990, c. T.23.

[92] When, after the death, the family began to raise questions about the deceased's medical treatment, the doctor said that he had discussed the tumour with the deceased, who had declined radical surgery or radiation. He claimed that he had notes in his file that would corroborate his story. It was only after making a complaint to the College of Physicians and Surgeons that the family discovered, more than three years after the death, that the doctor had been lying to them, that he had never recommended radical treatment and that he had prepared a false set of notes.

[93] The Court of Appeal held that the doctrine of fraudulent concealment applied and that the action was not time-barred. It defined fraudulent concealment as follows, at para. 22:

> Fraudulent concealment has been defined to include "conduct, which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for one to do towards the other". (*Kitchen v. Royal Air Force Association*, [1958] 2 All E.R. 241 (C.A.) per Lord Evershed M.R. at p. 249, cited with approval in *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 at para. 63. See also, *Guerin v. The Queen*, [1984] 2 S.C.R. 335).

[94] It was described as an equitable principle, used to prevent an injustice, and not as a rule of construction – at paras. 28 and 29:

> Unlike the discoverability rule, with which Abella J.A. was concerned [in *Waschkowski v. Hopkinson Estate* (2000). 47 O.R. (3d) 370], the common law doctrine of fraudulent concealment is not a rule of construction. It is an equitable principle aimed at preventing a limitation period from operating "as an instrument of injustice" (see *M.(K.)*, supra, at para. 66). When applicable, it will "take a case out of the effect of statute of limitation" and suspend the running of the limitation clock until such time as the injured party can reasonably discover the cause of action (see *M.(K.)* supra, at paras. 65 and 66). Its underlying rationale is grounded in the well-established principle, reiterated in *Goldin (Trustee of) v. Bennett and Co.* (2003), 65 O.R. (3d) 691 at para. 35, that equity will not permit a statute to be used as an instrument of fraud.
>
> In other words, unlike the discoverability rule, the doctrine of fraudulent concealment is not dependent upon the particular wording of the limitation provision. When applied, there is no risk that the limitation provision will be construed in a manner not intended by the legislature. Fraudulent concealment is concerned with the operation of the provision, not its interpretation. Stated succinctly, it is aimed at preventing unscrupulous defendants who stand in a special relationship with the injured party from using a limitation provision as an instrument of fraud.

[95] The Court concluded on the facts that there was fraudulent concealment. Moldaver J.A., speaking for the Court, stated at para. 39:

> .... on the facts as pleaded, it would be open for a trier of fact to find that as a direct result of Dr. Harvey's duplicity in August 2001, the estate went from thinking that it likely had a cause of action against him to thinking that it might well not. In that regard, Dr. Harvey's ploy was simple but potentially very effective. It was designed to throw the estate off track by pitting his credibility and reliability as a doctor and specialist in urology against that of an elderly, distraught, grieving widow who had recently undergone a very stressful period in her life.

[96] In an interesting footnote, Moldaver J.A. observed that fraudulent concealment could "stop the clock from running" even after the limitation period had begun to run, although it was not necessary to decide when the clock starts to run after there has been fraudulent concealment:

> On the facts of this case, it is unnecessary to finally decide when, in cases of fraudulent concealment, the limitation clock starts to run or, having started to run, when it stops and when it starts up again. That said, I reject Dr. Harvey's submission that fraudulent concealment cannot stop the clock from running once it has started. As pointed out in M.(K), supra at para. 64 fraudulent concealment *may involve active concealment of a right of action after the action has arisen* or, it may arise from the manner in which the act that gives rise to the right of action is performed (emphasis added).

[97] The facts of *Giroux Estate* were extreme, and Mr. Groia for the plaintiff is careful to observe that he does not allege fraud here. The question, however, is whether a defendant who is in a special relationship with the plaintiff may be precluded from relying on the limitation period due to conduct that falls short of fraud.

[98] That was the situation in *Sheeraz v. Kayani*, referred to above. The plaintiff had retained a lawyer to secure a licence agreement permitting his company to operate a business as a pub. The licence that the lawyer acquired did not permit the operation of a pub and the business failed. The motion judge found that the plaintiff knew, by May 26, 2004, that the lawyer had failed to obtain the licence. However, after discovery of the problem, the lawyer continued to act on the file and was asserting that the loss had been caused by misrepresentations of the vendor. The lawyer was attempting to negotiate a resolution to salvage the investment, and was threatening to bring an action against the vendor if the situation was not rectified. The last letter written by the lawyer on the file was addressed to the vendor and was dated June 10, 2004. The action against the lawyer was commenced two years less a day later, on June 9, 2006.

[99] Price J. dismissed the lawyer's motion for summary judgment. He held that the existence of an ongoing solicitor and client relationship – being a relationship of dependency – could be a factor in determining whether the plaintiff knew that a legal proceeding against his lawyer would be an appropriate means to remedy the injury, loss or damage within the meaning of s. 5(1)(a)(iv) of the *Limitations Act, 2002.* He held, at paras. 48 and 49:

> It is consistent with the spirit of these provisions [s. 7 dealing with persons under a disability and s. 10 dealing with claims for assault and sexual assault] that section 5 also be interpreted in a manner that allows some regard to the effect of a relationship of dependence. In the circumstances, Mr. Sheeraz was largely dependent on Mr. Kayani, notwithstanding that he had obtained a second opinion from Mr. Thomas. Section 5 should be interpreted broadly to have regard for the effect that his dependence may have had on his ability to assess whether his lawyer has breached a duty owed to him or whether a proceeding was the appropriate means of seeking a remedy.
>
> The recognition that an ongoing solicitor and client relationship may impede or impair a client's knowledge that a legal proceeding against his lawyer is an appropriate means of seeking a remedy is also consistent with the view courts have expressed in the context of the limitation period applying to the assessment of solicitor and client accounts. It has been held, in that context, that the objective of avoiding uncertainty and billing vulnerability for lawyers must be balanced with the objective of not creating results that will obligate clients to challenge each account as it arrives, thereby hampering the solicitor-client relationship in an ongoing matter. See *Ling v. Naylor* [[1998] O.J. No. 5263, 31 C.P.C. (4th) 223 (Gen. Div.)]; *Bunt v. Assuras* [(2003), 63 O.R. (3d) 622, [2003] O.J. No. 807 (S.C.J.)].

[100] Price J. noted that rule 6.09 of the *Rules of Professional Conduct* requires a lawyer who discovers an error or omission that may cause damage to the client to promptly advise the client of the error, recommend that the client obtain independent legal advice and advise the client that the lawyer may no longer be able to act. He observed that the lawyer's failure to fulfill these obligations could amount to a breach of fiduciary duty to the client.

[101] Rule 6.09 of the *Rules of Professional Conduct* provides:

> 6.09 (1) When, in connection with a matter for which a lawyer is responsible, the lawyer discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the lawyer shall (a) promptly inform the client of the error or omission being careful not to prejudice any rights of indemnity that

> either of them may have under an insurance, client's protection or indemnity plan, or otherwise, (b) recommend that the client obtain legal advice elsewhere concerning any rights the client may have arising from the error or omission, and (c) advise the client that in the circumstances, the lawyer may no longer be able to act for the client.

[102] Price J. concluded that there was a genuine issue for trial on the discoverability issue.

Discussion

[103] As I have determined that there is a genuine issue requiring a trial in this case, I should make it clear that the observations that follow are not conclusive findings of fact but simply preliminary conclusions about what a trial judge might find, based on the evidence that has been presented on this motion.

[104] The evidence supports the conclusion that Charette retained FMC to assist him with the tax problem caused by his reliance on the advice of FMC and BDO and the representations of the promoters of the Program. This occurred before he received the Notice of Reassessment from CRA and before he paid the $600,000.

[105] A trial judge could reasonably conclude that a solicitor and client relationship came into existence between Charette and FMC

[106] A trial judge could reasonably conclude that FMC had a conflict of interest.

[107] FMC's interests were at stake, because if its opinions were wrong and CRA's assessments were maintained, it could face an enormous liability. This liability would extend not only to its immediate clients and to the promoters, but also to the participants in the Program, like Charette, who had made millions of dollars in "donations" as a result of its positive opinion. FMC had a clear interest in rectifying Charette's problem. A trial judge could conclude that it should have been obvious to FMC, however, that if Charette's tax problem could not be rectified, he had potential causes of action against FMC itself, BDO, and FMC's clients, Trinity and the promoters.

[108] No partner or associate of FMC has provided evidence on this motion concerning the services rendered in connection with the Program or, significantly, concerning the services rendered to Charette and other participants after CRA disallowed their tax credits. FMC's evidence consists of an affidavit sworn by a partner in BDO and an associate in BDO's law firm, together with certain documentary evidence. Significantly, therefore, there is no evidence as to what advice, if any, FMC gave to Charette when it agreed to act for him in his challenge of the CRA assessment.

[109] It is undisputed that Charette was not advised of this conflict and was not advised of his potential remedies. He was not advised that he should obtain independent legal advice.

[110] Charette found himself in the middle of a high stakes dispute with CRA – what could be described as a "hostile and hideously complicated environment", to use the expression of Binnie J. in *R. v. Neil*, [2002] 3 S.C.R. 631, [2002] S.C.J. No. 72 at para. 12. In the circumstances, he was entitled to expect candour and undivided loyalty from his law firm. If they were conflicted, they should have declined to act and should have ensured that he obtained independent legal advice.

[111] Instead, the evidence suggests that FMC continued to act for Charette and re-assured him, through BBK, that FMC's opinion was right, CRA's position was wrong and that he had no legal obligation to pay the taxes CRA claimed were owing. Charette was not advised that there was a limitation period within which he was required to sue FMC and the other defendants or that his payment of the CRA assessment might have the effect of crystallizing his damages and triggering the commencement of the limitation period.

[112] Considering all these circumstances, as well as the confusing and intimidating nature of the CRA assessment and appeal process, a trial judge might conclude that even a sophisticated taxpayer like Charette did not and could not know that damage had occurred or that a legal proceeding against the defendants would be an appropriate remedy. The lawyers against which he might have a claim were acting for him in connection with the assessment – he could reasonably expect, indeed was entitled to expect, that their interests were not in conflict and that there was no issue between them.

[113] The defendants rely on *McWhorter and Kenderry-Esprit (Receiver of) v. Burgess, MacDonald, Martin & Younger* (2001), 53 O.R. (3d) 208, [2001] O.J. No. 776 (S.C.J.) and *Ingredia S.A. v. Canada*, 2009 FC 389, [2009] F.C.J. No. 491 at para. 51, aff'd 2010 FCA 176, in support of their submission that the plaintiff cannot simply wait to see whether a judgment is established against him or her to decide whether to sue the lawyers. Once the plaintiff knows that there is a "live issue" concerning the quality of the lawyer's work, the time begins to run: *Indcondo Building Corp. v. Steeles-Jane Properties Inc.* (2001), 14 C.P.C. (5th) 117, [2001] O.J. No. 3316 (S.C.J.). I do not disagree with this as a general proposition. There is a genuine issue, requiring a trial, as to whether the plaintiff knew or ought to have known that there was a live issue.

[114] The defendants also suggest that the limitation period must have begin to run when FMC got off the record in 2008 and new lawyers stepped in to take over the test case. If that is so, the action would have been time-barred at the time it was commenced.

[115] It will be an evidentiary question as to whether those new lawyers had any duty to inform Charette of his rights against FMC or whether they were retained solely to prosecute the test case. It will also be an evidentiary question as to whether the cloud over Charette's knowledge as a result of FMC's conflict was lifted, because it ceased to act for him. The issue of when the clock resumes running in cases of fraudulent concealment was left open by Moldaver J.A. in *Giroux Estate* and it remains an open question here.

[116] I have concluded that this is one of those cases in which the nature of the issues and the nature of the evidence requires a trial for the fair resolution of the proceeding.

[117] This case raises difficult, novel and important questions of mixed fact and law, including:

> (a) whether FMC had a conflict of interest;
>
> (b) if so, whether any of the other defendants are affected by that conflict;
>
> (c) if there was a conflict, whether it affected the discoverability of the claim or otherwise had the result of postponing, interrupting or extending the limitation period in relation to FMC and the other defendants;
>
> (d) whether, once interrupted, the limitation period began to run again and, if so, when.

[118] In my view, these issues should be addressed on a full factual record. There is virtually no evidence in the record from FMC concerning its conduct, its relationship with Charette or its relationship with the other defendants. Nor is there evidence from BDO and Arnold on this issue. As well, a trial is required to assess Charette's evidence and his credibility.

[119] There are two other reasons why a trial is required, in my view. First, this is a putative class action. Some of the issues of fact may be capable of resolution on a class-wide basis. If the action is certified, and some of the above issues are found to be common issues, their resolution will have implications for the class as a whole.

[120] Second, the responsibilities of lawyers providing advice to large and disparate groups of clients, particularly when those clients have relationships with other clients of the law firm, are matters of increasing concern to both the public and the legal profession. It is appropriate that such matters be addressed on a full factual record.

[121] While the circumstances of BDO and Arnold are different from FMC, I have concluded that their positions are so intertwined with FMC's that it would not be in the interests of justice to resolve the claims against them by way of summary judgment.

Conclusion

[122] For the foregoing reasons, the motions are dismissed. Costs, if not otherwise resolved, may be addressed by written submissions.

G.R. Strathy J.

DATE: May 15, 2012